STATE OF MICHIGAN

COURT OF APPEALS

JEFFREY SCOTT ORHAN, Plaintiff-Appellant,	UNPUBLISHED April 29, 2014
v	No. 313738 Wayne Circuit Court
NANCY NIHEM, DARRYL NIHEM and JOHN DOES, Defendants-Appellees.	LC No. 12-004408-CZ

Before: DONOFRIO, P.J., and CAVANAGH and JANSEN, JJ.

PER CURIAM.

In this invasion of privacy action, plaintiff appeals by right the trial court's order granting defendants'[1] motion for summary disposition. We affirm.

Plaintiff argues that the trial court erred when it granted defendants' motion for summary disposition because he had an expectation of privacy in his Nations Funding e-mail account. Specifically, plaintiff argues that it was an invasion of his privacy when Susan Ericson accessed and copied e-mails from his Nations Funding account. We disagree.

Defendants moved for summary disposition pursuant to MCR 2.116(C)(10). We review de novo the trial court's decision on a motion for summary disposition. *Hoffner v Lanctoe*, 492 Mich 450, 459; 821 NW2d 88 (2012).

Michigan Courts recognize the tort of invasion of privacy through four distinct theories: intrusion upon seclusion, public disclosure of private facts, publicity placing another in a false light in the public eye, and the appropriation of another's likeness for the defendant's advantage. *Dalley v Dykema Gossett*, 287 Mich App 296, 306; 788 NW2d 679 (2010). Intrusion upon seclusion involves three necessary elements: "'(1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a

[1] The identity of "John Does" is not directly addressed by plaintiff. For purposes of this opinion, "defendants" refers to Nancy Nihem and Darryl Nihem only.

reasonable man.'" *Id*. (citation omitted). Though Michigan Courts have not adopted a specific test for what constitutes a secret and private subject matter, facts and details regarding a person's medical treatment, condition, and sexual relations have been identified as private. *Doe v Mills*, 212 Mich App 73, 82-83; 536 NW2d 824 (1995). Actions for intrusion upon seclusion focus on the "manner in which the information was obtained, not on the information's publication." *Lewis v LeGrow*, 258 Mich App 175, 193; 670 NW2d 675 (2003). However, "there can be no invasion of privacy under the theory of intrusion upon seclusion . . . if plaintiff[] consented to defendant's intrusion." *Id.* at 194. In the context of intrusion upon seclusion, "express or implied consent is often referred to as a waiver of the right to privacy." *Id*.

"A cause of action for public disclosure of embarrassing private facts requires (1) the disclosure of information, (2) that is highly offensive to a reasonable person, and (3) that is of no legitimate concern to the public." *Doe*, 212 Mich App at 80. As with an action brought under a theory of intrusion upon seclusion, facts regarding a person's sexual relations are considered private. *Id*. at 82.

Plaintiff's argument that defendants invaded his privacy are meritless. Plaintiff has failed to establish the existence of a genuine issue of material fact regarding whether there was a secret and private subject matter. Plaintiff denied ever engaging in an extramarital affair with Tina Ford during his deposition, and stated that any e-mails obtained in his work account demonstrating otherwise were false or fraudulent. Therefore, plaintiff holds the inconsistent position in this litigation that defendants tortiously obtained information through his e-mails, but that the information obtained was not actually information. This position is illogical. Similarly, regarding plaintiff's theory of public disclosure of private embarrassing facts, plaintiff has not identified an actual disclosure of information; plaintiff denies that the content of the e-mails obtained by Ericson is true. Accordingly, plaintiff has failed to properly support his claims predicated on intrusion upon seclusion and public disclosure of private embarrassing facts.

Even assuming arguendo that plaintiff demonstrated the existence of a secret and private subject matter, he has not pointed to any authority to establish that he had a right to keep the information private. Plaintiff's e-mail password was kept on a master spreadsheet in the office that was accessible to all employees. Ericson had used the spreadsheet numerous times in the past to access plaintiff's e-mails, generally in response to a pressing work issue. Though there may be a factual question regarding whether plaintiff had waived his right to privacy in his Nations Funding e-mail account, Ericson is not a party to this litigation. Plaintiff has not demonstrated that defendants directed Ericson to access his e-mails. The only evidence linking defendants to the e-mails obtained by Ericson is an e-mail from defendant Nancy Nihem to her sister's divorce attorney, in which Nancy wrote, "I am very concerned that [plaintiff] is going to go to the office this weekend and mess with the computers. I have someone who can go in and copy everything, read what's on there." However, there is no evidence on the record that Nancy was referring specifically to plaintiff's e-mail account, nor is there evidence that Ericson received direction from defendants to access the account. Plaintiff's brief on appeal is unhelpful in addressing the analysis both factually and legally; it does not address the elements of either proposed invasion of privacy theory. Even taking the evidence in the light most favorable to plaintiff, there was no genuine issue of material fact regarding whether defendants ever obtained information or facts relating to a secret or private subject matter.

Plaintiff next argues that the trial court erred when it denied his motion for leave to add Ericson as a defendant in the proceedings. Specifically, plaintiff argues that Ericson admitted to accessing plaintiff's computer and e-mail account without permission. Further, plaintiff contends that there is a question of fact regarding whether Ericson acted in concert with defendants in obtaining plaintiff's e-mails. We disagree.

We review for an abuse of discretion the trial court's decision to grant or deny leave to amend a pleading. *Boylan v Fifty Eight LLC*, 289 Mich App 709, 727; 808 NW2d 277 (2010). Reversal is only warranted if the trial court's ruling "occasions an injustice." *Id.* "A court does not abuse it discretion if it selects an outcome falling within the range of reasonable and principled outcomes." *Id.*

Pursuant to MCR 2.118(A)(1), "a party may amend a pleading once as a matter of course within 14 days after being served with a responsive pleading by an adverse party." However, after this 14 day window, a party may amend a pleading by leave of the court or with the written consent of the adverse party. MCR 2.118(A)(2). Leave to amend "shall be freely given when justice so requires." MCR 2.118(A)(2). Motions to amend a complaint should be denied by the court "only for particularized reasons, such as undue delay, bad faith, or a dilatory motive on the part of the movant, a repeated failure to cure deficiencies in the pleadings, undue prejudice to the opposing party by virtue of allowing the amendment, or the futility of amendment." *Boylan*, 289 Mich App at 728.

At the hearing on defendants' motion for summary disposition, after the trial court had granted the motion, plaintiff's counsel stated, "[P]rocedurally I assume that in light of your ruling you are also denying our motion to add Susan Ericson to their case because [there] was [no] expectation of privacy." The court replied, "Right." As noted, the court properly granted defendants' motion for summary disposition because plaintiff failed to establish that secret or private matters were disclosed. In light of that ruling, any addition of Ericson as a party to the case would have been futile; because plaintiff denied the validity of the e-mails suggesting an affair with Tina Ford, any invasion of privacy claim against Ericson would have been meritless. Plaintiff does not make any legal or factual arguments regarding the futility of adding Ericson as a party to the proceedings. Moreover, plaintiff fails to explain why he waited from August 22, 2012, when it became clear that Ericson accessed his e-mails, until November 9, 2012, to file his motion for leave to amend the complaint. The trial court did not abuse its discretion by denying plaintiff's motion for leave to amend the complaint.

Affirmed. Defendants Nancy Nihem and Darryl Nihem, having prevailed on appeal, may tax their costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Mark J. Cavanagh
/s/ Kathleen Jansen